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BRIEF FOR COMPLAINANT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1924.

Original, No. 8, 4 1.

STATE OF NEW MEXICO

vs.

STATE OF COLORADO

Frank W. Clancy,
Counsel for Complainant.

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IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF NEW MEXICO

vs.

THE STATE OF COLORADO

STATEMENT OF CASE

This is an original suit in equity, brought in this court to ascertain and settle the boundary between the two states. The bill of complaint sets up that the boundary line between the two states, by the legislation of Congress under which Colorado was admitted into the Union and by the constitution of New Mexico, extends along the 37th parallel of north latitude from the 32nd meridian of longitude west from Washington in an easterly direction to the 103rd meridian of longitude west from Greenwich. (Record, p. 2.) This is admitted by the answer. (Record, p. 209.) The bill further shows that on July 7, 1902, Howard B. Carpenter, a surveyor, entered into a contract with the United States to re-survey, re-establish and re-mark the boundary line between Colorado and the territories of New Mexico and Oklahoma, and that in pursuance of the contract and instructions given to him by the acting Commissioner of the General Land Office, he did re-survey, re-establish, and re-mark said boundary line as will appear by the record and field notes of his work, a copy of which together with a copy of said instructions, so far as the record and field notes cover that portion of the 37th parallel which constitutes the boundary between Colorado and New Mexico, is attached to the bill as a part thereof, which field notes were approved by the Com-

293-4.) while Darling's line is 331 miles plus 60 chains in length (Record, pp. 450-60.) It should be borne in mind that Darling's line was surveyed from east to west. (Record, pp. 304-5), and Carpenter's line, pursuant to specific instructions, was surveyed from west to east. (Record, pp. 4 to 7.)

The answer next avers that for more than 30 years the Darling line remained undisputed and has been generally recognzied by both of the states and by the Federal Government as the true boundary line, and sets up in some detail matters in support of that general assertion, and the disastrous effect of adopting the Carpenter line. Complainant made a motion to strike out parts of the answer and that motion and the argument in support thereof, appear at pages 463 to 468 of the Record, but the Court denied the same "without prejudice to its being presented when the case is reached on the merits." (Record, p. 474.)

This motion is therefore now presented for consideration, although, in part, it may not be necessary for the court to consider it in view of the facts disclosed by the testimony. It was based upon the idea that the only issue proper to be considered was the location, on the earth's surface, of the 37th parallel, but defendant's position seems to be that it is immaterial where that parallel may be, and that the boundary must be where the Darling survey placed it, no matter whether that survey is on the parallel or not, and no matter whether that survey was complete and correct within itself, complainant containing that it is not accurate, discredits itself on its face and is impossible of re-location on the parallel.

Defendant filed a cross-bill with its answer, asserting the correctness of the Darling line, and praying that the boundary be decreed to be that line.

Much later, with the consent of complainant, defendant filed an amended answer and cross-bill to cover a part of the boundary line, short in length, east of what is known as the Macomb monument which was Darling's initial point (Record, p. 304) for a distance

POINTS AND AUTHORITIES

FIRST

The Carpenter survey is, by expert testimony, shown to be excellent and of the highest order.

I do not anticipate that this will be seriously controverted, as defendant's position seems to be that the character of Carpenter's work is immaterial. (Record, p. 500.) and I will therefore merely give some references to the uncontradicted testimony which supports this point, as follows:

Testimony of Arthur D. Kidder, at pages 542-3, 548 o, 550, 559

Testimony of Frank M. Johnson, at page 569

SECOND

The Darling Survey is grossly inaccurate.

Counsel for defendant, I imagine, will say that this is immaterial, their position being that it makes no difference whether the Darling line is correct or not, because it has been recognized for so long a time as fixing the boundary, that it makes no difference whether or not it is on the 37th parallel or somewhere else or whether it is actually existent or not.

Complainant contends that the testimony shows, without contradiction, that the Darling line is not only inaccurate, but in great part was never actually run on the ground.

By the testimony of Frank M. Johnson, Supervisor of Surveys, at page 569 of the record, and of Monzo E. Compton, formerly

erly assistant Supervisor of Surveys at page 623 of the Record it is clearly shown that running west from his astronomical Monument No. 6, Darling appears to have run west until he reached the Navajo river, when he discovers that that he is far south of the parallel, and moved up about 35 chains to the northeast, and there establishes his astronomical monument No. 7 and makes the statement that he corrects his line back to his 101st mile corner, but did not actually do so although his field notes show a running of his line back eastwardly to the 101st mile. These witnesses testify positively that he did run such an east line as far back as Ewell Cañon, a distance of 2 or 3 miles and no farther, while his notes show (Record pp. 409 to 417) a running east from 214th mile back to the 101st mile, a distance of 23 miles. In other words he made a purely imaginative and fictitious record, and never connected his monuments 6 and 7. An attempt was made in 1917 to restore the portion of the Darling line up to the 7th monument, the result of which is shown on Complainant's Exhibit No. 11 following printed page 714 of the record.

EX PEDE PARTEELAM DARLING?

That may not be good Latin, but it conveys the idea, and so does *falsus in uno, falsus in omnibus.*

But no matter how demonstrably false is Darling's work, defendant says it has ripened into a perfect boundary and cannot now be disturbed, while complainant contends that it falls within the exception indicated by the Commissioner of the General Land Office, in his letter at page 528 of the Record, where he says that "the so called Darling location which was executed under proper Federal authority and duly accepted, was in the absence of fraud or gross irregularity, conclusive upon the Territories."

Here we have both fraud and gross irregularity.

It appears from the Record (pp. 502-3) that Frank M. Johnson, then examiner of surveys, in 1896, made an exhaustive examination of about 15 miles of where the Darling line might be looked for, in connection with an effort to relocate the corner

the Southern Ute Indian Reservation on that line, without discovering on the ground any evidence of Darling's survey, and the next year, 1900, he made further examination under instructions of the Commissioner of the General Land Office, to attempt to identify and relocate the Darling line, that examination including the line between the 6th and 8th astronomical monuments of the Darling Survey. (Record p. 304) covering 120 miles. Number 6 was found and identified and a number of corners to the west across the Carnero range but none in the valley of the Navajo River with the exception of a stone southwest of Monument No. 7, about 38 chains distant, marked and buried in the ground, not mentioned in Darling's notes, and was at the terminus of the line run by Johnson from Monument No. 6. This stone was pointed out by old residents who thought it was a monument on the Darling survey. Johnson found blazed trees up to the vicinity of where the stone was found, and continued his examination on west from the stone but found no evidence of the line. He made an examination west of monument No. 7, and found Darling's 217th mile corner, between two and three miles from that monument, and the 233 mile corner and no others between 7 and 8, the last being seven six and seven miles west of the 233 mile corner. He says that this examination was sought by the Land Office to develop the true condition of the Darling line, with a view to its possible restoration.

The fact that the Commissioner gave instructions for this examination shows a lack of acquiescence in, or recognition of, the Darling line, "through the department of public lands" and in this connection, attention is called to the letter of the Commissioner at page 803 of the Record; and a similar lack, through the legislative department, is to be found in the fact of the authorization of the resurvey in 32 Stat. at Large, page 754, which was made in pursuance of recommendations and estimates from the Department (Record, pp. 310, 797-80).

It also appears from the record that Congress passed a resolution adopting the Carpenter line, which was properly vetoed by President Roosevelt. (Record, pp. 303-4.)

Attention is also called to the interesting letter of Acting Commissioner Dimple at pages 800 to 803 of the Record, and also to the letter of Commissioner Richards at pages 806 to 809.

Even the State of Colorado did not know "where it was at," as shown by the act of its general assembly, of April 26, 1901. (Record, p. 1068.)

The report of the commissioner appointed under that act appears at pages 670 to 673 of the Record, and is confirmatory of our position as to the defective and inaccurate condition of the Darling line.

THIRD

There has not been continuous recognition of the Darling line by the United States.

The defense is founded upon the alleged acquiescence in, and recognition of, the Darling line by Colorado, New Mexico and the United States for more than 30 years, and the argument in support of that defense must be based on the case of *Missouri vs. Iowa*, 7 Howard, 660, which sets out that a state is in such private grant the United States as to matters antecedent to its admission into the Union, that it is bound by what the United States may have done while the state was a Territory and unable to assert any rights for itself. This must be taken as the established doctrine of the court, but complainant contends that the facts here are so different from those in the Missouri–Iowa case, that that case is not applicable.

It may be well as briefly as possible to state here what that case was, and what the court held.

Missouri filed a bill, alleging that Iowa had obtruded into Missouri for a space of more than ten miles wide and about 200 miles long; Iowa answered, denying the right claimed by Missouri and filed a cross bill charging Missouri with attempting to encroach upon the territorial limits of Iowa, and praying, much like the original bill, that the boundary between the two states be ascertained by a decree of the court, settling the true and rightful

between the two states. It will be seen, according to the opinion of the court, that the pleadings did not claim any particular line. The court says that the controversy originated in 1837 between the United States and the State of Missouri and was carried on for ten years before Iowa came into the Union in 1846, and that she was bound by the acts of her predecessor, the United States. In 1816 John C. Sullivan was sent by the United States to run the Indian lines, north of the Missouri river. The court says there were 15 Indian Treaties referring to the line run by Sullivan in 1816, each of which recognized that boundary as the Missouri State line, and must be taken as admissions on the part of the general government that the Missouri boundary and the old Indian Boundary were identical. From the time Missouri became a state, Sullivan's line had been recognized by the United States as the true northern boundary of Missouri, so that the United States were committed to this line when Iowa came in to the Union, and Iowa must abide by the condition of her predecessor and cannot now be heard to disavow the old Indian line as her true southern boundary. The Court disregarded the claims of both states, and fixed the boundary on the line surveyed by Sullivan in 1816. After discussing the varying claims of the two states, the court says that it is driven to that call in the constitution of Missouri which declares that her western boundary shall correspond with the Indian Boundary line. The decree recites that the Sullivan line is the one to which the descriptive call in the constitution of Missouri refers as the true western and northern boundaries of the state of Missouri; and that the State of Missouri had recognized these lines as her boundary for the first ten years of her existence, if not more. But that in the year 1837, she caused another line to be run as her northern boundary, lying about ten miles north of the Sullivan line, and claims jurisdiction up to that line of 1837, and that she was not justified in causing the line of 1837 to be extended as her northern boundary; and the court further found that Iowa was estopped from setting up claim to a line south of the Sullivan line as by her cross-bill she attempted to do. At page 580 of the report, this court said:

FOURTH

New Mexico could not acquiesce in, or recognize, any boundary [illegible] after January 6, 1912.

FIFTH

The record shows that "the department of public lands" attempted absolutely to repudiate and abandon the Darling line.

(Not the record, which, in effect, required the making of a new and independent survey of the boundary, beginning at its western end and running east instead of retracing the Darling line which ran from east to west; the making of a new set of astronomical observations with no attempt to re-establish those of Darling; a redetermination of coordinates; a new making of the mile corners and the obliteration of all evidences of corners or monuments set by Darling.

These instructions evidence the settled purpose of the Land Office to destroy and obliterate the Darling line as far as possible and not to recognize it as of any value whatever.

In addition to this, special instructions to Mr. A. E. Compton (Record p. 820 — which were approved by the Commissioner of the General Land Office, specially directed him to make a closing of Township 32 North, Range 4 West, on the Carpenter line. That was in 1907. Patents have been issued for land in that township which extend to the Carpenter line. (Record, p. 500.)

In closing this hastily prepared and inadequate brief, — hastily prepared because I did not get the printed record, without which I could not proceed, until November 3, 1924, only a few days before starting from New Mexico to Washington, — I will attempt a summary of the complainant's position.

First, it is clear that the Carpenter survey is as good as can be made.

Second, the Darling survey is inaccurate, defective, and in part work of pure fiction.

Third, the General Land Office must have been thoroughly convinced of the utterly worthless character of the Darling survey, when it directed the making of a new and independent survey of the 37th parallel with an accompanying destruction, as far as possible, of all evidence on the earth's surface of the Darling line.

Fourth, Congress presumably took the same view when it authorized that new survey, and, later, passed a resolution adopting the Carpenter line.

Fifth, the State of New Mexico has not recognized the Darling line as a boundary.

Sixth, The United States while recognizing the Darling line for years, only because nobody questioned it, finally repudiated it and tried to destroy it.

Seventh, even the State of Colorado, through its legislature, in 1901, shows a lack of certainty as to the Darling line which it now claims to have recognized ever since 1868.

It is respectfully submitted that the Carpenter line should be adopted as showing the boundary between the two states.

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